IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1548

CALIFORNIA BREWERS ASSOCIATION, *et al.*,
Petitioners,

v.

ABRAM BRYANT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

The Equal Employment Advisory Council ("EEAC"), with the consent of all parties, respectfully submits this brief as *Amicus Curiae.*

I. INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council is a voluntary nonprofit association organized to promote the common interest of employers and the general public in the development and implementation of

sound government policies, procedures, and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity, whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

Substantially all of EEAC's members, or their constituents, are subject to the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 1981 and the various other Federal orders and regulations pertaining to nondiscriminatory employment practices. As such, they have a direct interest in the issues presented for the Court's consideration in this case.

Because of this interest, EEAC has participated as *Amicus Curiae* in other cases before this Court which involved interpretations of Section 703(h) of Title VII, the statutory provision of primary concern here. *See e.g., International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977); *United Air Lines* v. *Evans*, 431 U.S. 553 (1977); and *Trans World Airlines* v. *Hardison*, 432 U.S. 63 (1977).

II. PRELIMINARY STATEMENT

Amicus seeks articulation of a reasonable standard for defining "seniority system" pursuant to the protection offered by Section 703(h) of Title VII of the

Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(h). That section provides:

> Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin . . . .

Interpreting this provision, the Court held in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 353-54 (1977), that "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination." While the Court had occasion there to outline the appropriate analysis for determining the *bona fides* of a seniority system under Section 703(h), 431 U.S. at 355-56, it was not required to address what constitutes a "seniority system" to begin with, and, thus, what constitutes the scope of the protection provided by this important provision. The present case presents that question.

A. Facts

For over twenty years, the seniority section of the collective bargaining agreement for the brewing industry in California has contained the provisions here at issue.[1] *Bryant* v. *California Brewers Association*,

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[1] *See generally* Sections 4 and 5 of the collective bargaining agreement between the California Brewers Association and Teamsters Brewery and Soft Drink Workers Joint Board reproduced in The Appendix to Petition for Certiorari filed herein by The California Brewers Association, *et al.*, at 14-28 (the Appendix to the Petition is hereinafter referred to as "A.P.").

585 F.2d 421, 423 (9th Cir. 1978). Those provisions govern the definition, units, and acquisition of seniority. Thus, the parties' contract provides that "for seniority purposes only" there shall be five classifications of employees, three of which are here significant: new employees, temporary employees, and permanent employees.[2] A.P. 14. Each classification constitutes a separate seniority roster, with such important rights as job referral, bumping, and layoff determined by seniority order within each classification. A.P. 17-19, 24-26. Among the classifications, permanent employees enjoy the greatest benefits and protections, temporary employees come next, and new employees are at the bottom. A.P. 17-18; *Bryant, supra*, 585 F.2d at 423-24. The system also provides rules for the advancement of employees from one seniority classification to the next. A new employee must work sixty days in a calendar year to become a temporary employee, and a temporary employee must work 45 weeks in a year to become a permanent employee. The bargaining agreement does not provide for the carry-over from year to year of the time accumulated toward satisfying these work requirements. Thus, if a temporary employee does not complete the 45-week requirement by the end of a given calendar year, he must start over again the following calendar year. A.P. 14-15; *Bryant, supra*, 585 F.2d

[2] The two other seniority classifications are temporary bottlers and apprentices. A.P., *supra* note 1 at 14. The distinction between temporary bottlers and temporary employees generally is not here material, *id.*, and the apprentice classification does not appear to be involved in this action, *see Bryant* v. *California Brewers Ass'n, supra*, 585 F.2d at 423-28.

at 423-24. However, vis-a-vis other temporary employees, this person retains his competitive seniority. A.P. 17-19. As a result, longer-term temporary employees enjoy superior protection against layoff and superior rights to recall should layoff occur and, therefore, have the best chance of becoming permanent employees. A.P. 17-19, 24.

Respondent Bryant has challenged this system on the ground that it unlawfully perpetuates prior discrimination. *Bryant, supra*, 585 F.2d at 427-28.[3] While direct challenge to this alleged past discrimination is now foreclosed as untimely, *United Air Lines* v. *Evans*, 431 U.S. 553, 558, 560 (1977), respondent nonetheless seeks a remedy on the theory that the 45-week requirement, together with diminished employment opportunities in the industry, currently makes it virtually impossible for any employee, black or white, to attain permanent status. As a result, respondent alleges, blacks are locked into the temporary classification and excluded altogether from the permanent one. *Bryant, supra*, 585 F.2d at 424; A. 16-17.

B. Proceedings Below

On appeal from dismissal of the complaint pursuant to FED. R. CIV. P. 12(b)(6), the court of appeals below reversed, holding that respondent may go to trial on his allegation that the 45-week provision of the collective bargaining agreement, though neutral on its face, has a disparate impact on employment opportunities for blacks. *Bryant, supra*,

[3] *See* Respondent's Second Amended Complaint, ¶¶ 13-15, reproduced in the Appendix filed jointly herein at 16-17 (the joint Appendix is hereinafter referred to as "A.").

585 F.2d at 423, 428. In that court's view, the 45-week provision "in effect preserves an all White class of permanent brewery employees," and thus may be unlawful under the disparate impact theory of *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 429-31 (1971). *Bryant, supra*, 585 F.2d at 423, 428.

The unions and employers had submitted that even if the 45-week provision of the collective bargaining agreement did have the alleged effect of perpetuating past discrimination, it nonetheless was immune from attack, because the provision is part of a *bona fide* seniority system and protected by Section 703(h) as construed in *Teamsters*. The court of appeals rejected this defense on the ground that the 45-week provision is not part of a seniority system at all. *Bryant, supra*, 585 F.2d at 425-27.

Starting from the premise that the "fundamental component of a seniority system is the concept that employment rights should increase as the length of an employee's service increases," the court of appeals found the 45-week provision not part of a seniority system for three related reasons. *Bryant, supra*, 585 F.2d at 426. First, in the court's view, "the brewery industry's 45-week requirement does not involve an increase in employment rights or benefits based upon length of the employee's accumulated service," since "the acquisition of permanent status may be independent both of total time worked or overall length of employment." *Id.* For example, one employee might satisfy the requirement in the very first year, whereas another employee might have worked several years, yet have been laid off each year prior to attaining permanent status. As a result, the second

employee could have both greater employment seniority (time since initial date of hire) and accumulated service than the first, yet occupy an inferior seniority status. This, the court concluded, is inconsistent with how a "true" seniority system should operate. *Bryant, supra*, 585 F.2d at 426-27. Second, the court also regarded the 45-week provision as not part of a seniority system because, rather than providing for incremental increases in employment rights or benefits based on overall length of service, the provision was viewed by the court as "an all-or-nothing proposition." Again, this was viewed as inconsistent with the "fundamental" concept of seniority. *Bryant, supra*, 585 F.2d at 427. Third, the court stated that "seniority rights under a true seniority system usually accumulate automatically over time," whereas under the 45-week provision, "an employee's chances of satisfying the provision automatically terminate at the end of each year." *Id.* In the court's view, this made "the system particularly susceptible to discriminatory application since employers and unions can manipulate their manpower requirements and employment patterns to prevent individuals who are disfavored from ever achieving permanent status." *Id.* For all these reasons, the court of appeals below concluded that the 45-week provision was not part of a seniority system and that Section 703(h), therefore, did not apply. *Id.*

C. Summary of Argument

In enacting Section 703(h), Congress sought to preserve employees' seniority expectations as embodied in the various seniority systems of American industry. Congress did not specify the type of sen-

iority system entitled to protection other than that the system be *bona fide*. Rather, in recognition of the myriad conditions existing in the American work place, Congress chose to rely on what has heretofore been a basic tenet of our national labor policy to provide employers and unions broad freedom to arrive at collective bargaining provisions that best suit their individual needs. Traditionally, that policy has counseled restraint from dictating to employers and unions what the terms of their agreement must be. The approach of the Ninth Circuit in this case to the determination of what constitutes a "true" seniority system is in fundamental conflict with that national policy as incorporated into Section 703(h).

The conflict arises from two distinct but related errors in the analysis of the court of appeals. First, the court mistakenly has regarded a narrow and particular concept of seniority as coterminous with the breadth of seniority *systems*. What it thereby failed to recognize is that a seniority system not only consists of some core seniority principle, such as the increase in employment rights or benefits with service, but also includes a host of integrally related provisions that are necessary for the operation of the system as a whole. These rules determine, among other things, how seniority is defined, measured, acquired, transferred, lost, regained and applied. Together the core seniority principle and the related rules form the seniority system.

In disregarding this unity, the Ninth Circuit has excluded from the reach of Section 703(h) the major components of vast numbers of seniority systems nationwide. Indeed, the unit-definition and transfer rules involved in *Teamsters* would in all likelihood not

survive the Ninth Circuit's narrow test. If this test were adopted generally, great numbers of similar seniority rules would be exposed to attack, and the seniority expectations of millions of workers whom Congress sought to protect through Section 703(h) would be in jeopardy.

The second and related error in the Ninth Circuit's approach is that it has dictated a particular way in which seniority systems must operate. Only if such systems involve (1) an increase in employment rights with service that occurs (2) incrementally as opposed to in an all-or-nothing fashion and (3) automatically with time rather than depending on other facts as well, will such arrangements be regarded as "true" seniority systems and eligible for Section 703(h) protection, regardless of their *bona fides*. Thus, contrary to the important and long-standing national policy noted above, to refrain from dictating the terms of parties' collective bargaining agreements, the rule of the Ninth Circuit would require that the seniority provisions of collective bargaining agreements, regardless of the circumstances under which they arose or their *bona fides*, conform to a particular, monolithic type. Again, all those deviating from the dictated pattern would lose the benefits of congressional protection, as would employee seniority expectations that had developed under them.

The approach of the Ninth Circuit is not only impermissibly narrow and particularistic, in conflict with national labor policy, but also unnecessary and in conflict with policies of Title VII as well. To be sure, Congress did not intend to provide a talismanic immunity to every provision remotely related to seniority, regardless of the nature of its impact upon

equal employment opportunities. At the same time, Congress clearly did intend to protect certain seniority expectations of incumbent employees, at least to the extent that these expectations are placed in jeopardy simply because the seniority system from which they derive tends to perpetuate past discrimination.

This suggests an accommodation between the national labor policy of respecting bargaining freedom on the one hand, and giving full reach to the intended remedial policies of Title VII on the other. Thus, where a provision arguably part of a seniority system is challenged under the *Griggs* doctrine for disparate impact, *Amicus* respectfully urges the following test be adopted for coverage under Section 703(h): First, in order to determine whether the provision is in fact part of a seniority system, the courts should look only for a nexus between the provision in question and the operation of the system as a whole. The customary types of rules for the definition, measurement, acquisition, transfer, and application of seniority, among others, would provide guidance in locating this nexus. Only if the provision could be said to have no relation to seniority, should it not be regarded as part of a seniority system under Section 703(h). In this way, arbitrary limitations upon the customary freedom accorded to collective bargaining can be avoided.

Second, once the provision is thus determined to be part of a seniority system, the analysis should proceed to a determination of *bona fides* as outlined in *Teamsters*. It was in confusing the two analyses —the existence of a seniority system with the *bona fides* of that system—that the Ninth Circuit committed error. While the court's confusion, caused by

its concern that Section 703(h) not sweep too broadly, is perhaps understandable, it is nonetheless unnecessary. The approach suggested here would provide an appropriate limitation to the reach of Section 703(h) without arbitrarily limiting as well the freedom of the collective bargaining process.

Through the enactment of Section 703(h), Congress sought to protect employees' seniority expectations that might otherwise be subject to Title VII attack simply because the seniority systems under which they have worked may perpetuate some past practice on the part of the employer. However, there is no indication that Congress intended this same provision to insulate employment practices which are independently discriminatory, apart from the perpetuation of the past, simply because such practices may be written into a seniority system. This suggests that in the unusual circumstance where a seniority system results in disparate impact other than through the perpetuation of some past practice, the *Teamsters bona fides* analysis should be supplemented by a consideration of the source of the disparate impact alleged. If, and to the extent that, the disparate impact results merely from the perpetuation of some past condition, then, consistent with the legislative intent underlying Section 703(h), the provision should not be subject to Title VII attack so long as it is otherwise *bona fide*. However, if, and to the extent that, the provision itself has a disparate impact independent of any past practices of the employer, as might be involved with an educational requirement or test, then the protection should not automatically apply, whether the provision is part of a seniority system or not. Rather, in such a case, the provision with disparate impact should be immune from attack

only if justified by valid business necessity or job relatedness as required by *Griggs*. In this way, the balance between freedom of bargaining and the remedial goals of Title VII would be preserved.

The 45-week provision would appear to meet both prongs of the suggested test. As a seniority acquisition rule, it has the required nexus to seniority, and, since its alleged disparate impact occurs solely through the perpetuation of alleged prior discrimination, it comes within the intended Congressional protection. There remains to be determined, however, whether the provision and the seniority system of which it is a part otherwise comply with the *bona fides* requirements of *Teamsters*, and a remand would appear appropriate for that determination.

III. ARGUMENT

A. The Court of Appeals Failed to Recognize that "Seniority Systems" Include Not Only the Concept of Seniority Itself, but Also a Great Variety of Traditionally Associated Rules Related to the Systems' Operation

In the enactment of Section 703(h) "the congressional judgment was that Title VII should not outlaw the use of existing seniority lists and thereby destroy or water down the vested seniority rights of employees. . . ." *Teamsters supra*, 431 U.S. at 353. While intending to provide broad protection for the seniority expectations of employees, *Teamsters, supra*, 431 U.S. at 352-53, 355; *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 79-83 (1977), Congress did not attempt to spell out in detail the type of seniority rights entitled to protection. *See* 42 U.S.C. § 2000e-2(h). Rather, Title VII leaves the term "seniority

system," as used in Section 703(h), undefined.[4] *See* 42 U.S.C. § 2000e. The situation is therefore analogous to that faced by the Court in *Aeronautical Industrial District Lodge 727* v. *Campbell*, 337 U.S. 521 (1949), where it was necessary to construe the term "seniority" as used in Section 8 of the Selective Training and Service Act of 1940, ch. 720, § 8, 54 Stat. 885 (1940), *as amended by* ch. 548, 58 Stat. 798, which provided that a veteran returning from military service was to be reinstated to his former position "without loss of seniority." In the course of determining what Congress there meant by "seniority," Mr. Justice Frankfurter outlined the approach appropriate here as well:

> [T]he Act uses the term "seniority" without definition. It is thus apparent that Congress was not creating a system of seniority but recognizing its operation as part of the process of collective bargaining. *We must therefore look to the conventional uses of the seniority system in the process of collective bargaining* in order to determine the rights of seniority . . . guaranteed [by the Act].

337 U.S. at 526 (emphasis added).

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[4] Likewise, the legislative history gives no indication that Congress attributed any special definition to the term. *See Teamsters, supra*, 431 U.S. at 355 n.41. For discussions of the legislative history to Section 703(h), *see Teamsters, supra*, 431 U.S. 352-53; *Trans World Airlines, Inc.* v. *Hardison, supra*, 432 U.S. at 79-83; *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 758-62 (1976); and *see generally* Vaas, *Title VII: Legislative History*, 7 B.C. IND. & COM. L. REV. 431, 444-45 (1966).

In "looking to the conventional uses of the seniority system in the process of collective bargaining," one immediately notes their enormous complexity and variety. As the Court observed in *Campbell*:

> There are great variations in the use of the seniority principle through collective bargaining bearing on the time when seniority begins, determination of the units subject to the same seniority, and the consequences which flow from seniority. All these variations disclose limitations upon the dogmatic use of the principle of seniority in the interest of the ultimate aims of collective bargaining. Thus, probationary conditions must often be met before seniority begins to operate; sometimes it becomes retroactive to the date of employment; in other instances it is effective only as from the qualifying date; in some industries it is determined on a company basis, in others the occupation or the plant is taken as the unit for seniority determination; sometimes special provisions are made for workers in key positions; and then again these factors are found in varying combinations. See Williamson & Harris, Trends in Collective Bargaining 100-102 (1945); Harbison, Seniority Policies & Procedures as Developed through Collective Bargaining 1-10 (1941).

337 U.S. at 526-27.[5]

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[5] *Accord*, Bureau of Labor Statistics, United States Department of Labor, *Major Collective Bargaining Agreements: Administration of Seniority*, Bulletin No. 1425-14 (1972) (hereinafter referred to as the *"1972 BLS Seniority Bulletin"*), which notes:

> Of the many provisions found in collective bargaining agreements, those governing the operation of seniority systems are among the most important and the most complex. They are important because seniority is a set of rights and privileges which normally becomes increasingly valuable to an employee over time. They are complex because seniority may have many applications, each subject to many conditions.

Id. at 1. In this study, the Bureau reports the results of its examination of 1,974 major collective bargaining agreements, each covering 1,000 workers or more, for a total coverage of some 8.2 million workers. Of these, some 1,501 agreements covering 6.1 million workers referred to seniority. "With the exception of agreements in the apparel and leather goods industries, all or nearly all the agreements in manufacturing established the principle of seniority." *Id.* at 2. In addition to numerous statistics on the prevalence of various types of seniority provisions, the Bureau's report also reproduces from the agreements examined some 182 *different* types of seniority clauses. *See also* Bureau of Labor Statistics, United States Department of Labor, *Collective Bargaining Provisions: Seniority*, Bulletin No. 980-11 (1949) (hereinafter referred to as the *"1949 BLS Seniority Bulletin"*), where some 269 different seniority provisions are reproduced.

Without regard for the congressional purpose to preserve this variety, the Ninth Circuit has attempted to reduce seniority systems to their bare bones, namely, "the concept that employment rights should increase as the length of an employee's service increases." *Bryant*, *supra*, 585 F.2d at 426. This Court has previously warned against such an approach:

> To draw from the . . . Act an implication that date of employment is the inflexible basis for determining seniority rights as reflected in layoffs is to ignore a vast body of long established controlling practices in the process of collective

> bargaining of which the seniority systems to which the Act refers is a part.

Campbell, supra, 337 U.S. at 527. The commentators as well have admonished that seniority systems are not the function of any single variable:

> Up to this point the word seniority has been defined arbitrarily as an employee's length of continuous service with the company. This broad definition is reasonably accurate insofar as eligibility for benefit programs is concerned. It serves well in the application of benefit seniority. However, *the definition may be entirely inadequate and misleading for those items involving the use of competitive status seniority* to determine order of layoff, recall, promotion, and other preferential treatment. For these areas the definitions are almost too varied to enumerate.

Slichter, Healy, and Livernash, *The Impact of Collective Bargaining on Management* 116 (1960) (emphasis added) (hereinafter referred to as "*Slichter*").[6]

In addition to the bare bones acknowledged by the court below, it is necessary to recognize that seniority operates within the context of a "system," as noted by the terminology in Section 703(h). *Webster's Third New International Dictionary of the English Language Unabridged* 2322 (1976) defines "system"

[6] The Court has relied on this treatise previously, citing it in *Franks* v. *Bowman Transportation Co., supra*, 424 U.S. at 766, in support of the Court's observation that "[s]eniority systems and the entitlements conferred by credits earned thereunder are of vast and increasing importance in the economic system of this Nation."

as a "complex unity formed of many often diverse parts subject to a common plan or serving a common purpose." The court below recognized a particular "common plan" but failed to appreciate the "diverse parts." To remedy this omission, and in order to arrive at a workable guide for what constitutes a seniority system for purposes of Section 703(h), the directive of *Campbell* to look to "the conventional uses of the seniority system in the process of collective bargaining," 337 U.S. at 526, provides useful guidance. Such an inspection reveals that the operation of the seniority principle in the context of collective bargaining involves both the "fundamental concept" of employment rights increasing with service, as well as a vast array of associated "ground rules." Together, the fundamental concept and these ground rules form the "seniority system."[7]

While there is no customary set of *particular* ground rules constituting a seniority system, the rules do fall into recognizable *types*. *Slichter, supra*, at 115, provides a useful list:[8]

[7] *See generally 1949 BLS Seniority Bulletin, supra* note 5; *1972 BLS Seniority Bulletin, supra* note 5; and *Slichter, supra* text accompanying note 6 at 104-139.

[8] *Cf. 1972 BLS Seniority Bulletin, supra* note 5 at 1, where the Bureau describes the provisions there studied in the following terms:

> In addition to describing the applications of seniority, the provisions usually define the circumstances under which seniority may be acquired, transferred, modified, lost, and, if such is permitted, regained.

See also 1949 BLS Seniority Bulletin, supra note 5 at viii, where the table of contents divides the seniority clauses there reproduced into the following types:

[Footnote continued on page 18]

(1) definition and measurement of seniority of service,

(2) acquisition of seniority,

(3) loss of seniority,

(4) use of superseniority,

(5) effect of merger and succession on seniority rights

(6) seniority of employees outside the bargaining unit, and

(7) special arrangements in administering seniority rosters.

Among each of these types, there is substantial variation, with no single rule being characteristic of any "true" seniority system. For example, among the rules relating to "definition and measurement," distinctions are often drawn between the measurement of seniority and the scope of its application. Seniority may be measured by length of service with an employer, in a plant, department, or job, or according to length of time within a given seniority classification, such as the new-employee, temporary-employee, and permanent-employee divisions at issue here. There may also be distinctions between seasonal and "year-round" employees. However measured, other rules may then determine the unit to

[8][Continued]

Definition and objectives of seniority, . . . Acquisition and calculation of seniority, . . . The seniority unit, . . . Exceptions to seniority rules, . . . Seniority status in intra-plant transfers or mergers, . . . Retention and loss of seniority, . . . Special preference based on seniority, . . . [and] Seniority lists and administration of seniority.

which seniority is to be applied. For example, seniority may be measured on a plant-wide basis, but layoffs governed by the application of this plant-wide seniority on a departmental basis. Further, the unit for measurement and the scope of application can vary according to the particular right or benefit involved. The possible variations are virtually endless. *See Slichter, supra,* at 116-123.

Similar complexity may be found in each of the other areas, with the variation in rules for acquiring seniority particularly apposite here. "Under most agreements an employee does not acquire any seniority until he has worked beyond the prescribed probationary period . . . ." *Slichter, supra,* at 123. However, the length of the probationary period varies from thirty, sixty or ninety days in some agreements to six months or more in others. Further, as Slichter describes:

> [T]he parties have learned through experience the necessity of defining more carefully the time credit to be given a probationer toward the satisfaction of his period. For example, if a new employee works intermittently for a company so that a total of 60 days are worked in a one-year period on eight different employment occasions, has he met the 60-day probationary requirement? One agreement resolves these questions by stating that if a probationary employee returns after losing ten days consecutively, he will start as a new employee. But if he is laid off, he will retain credit for time worked if recalled within six months. Another company and union have agreed that to become a seniority employee, a probationer must have been employed three months within the year following the date of hire

> or last rehire, whichever is later; layoff periods or leaves of absence for any reason are not to count toward the three months.

Slichter, *supra*, at 123-24.

From these examples, drawn from only two of the various types of seniority ground rules typically involved in collective bargaining agreements, it may be seen that a seniority system simply has no meaning apart from these rules. They are what determine how seniority is acquired, measured, transferred, lost, and applied. Thus, if Section 703(h) is to provide any meaningful immunity to the operation of seniority systems at all, it can only do so in regard to these rules.

Prior decisions of this Court have recognized the inclusion of seniority ground rules within the concept of a seniority system. For example, in *Teamsters*, *supra*, the Court had to consider not only the general question of whether a seniority system which perpetuates prior discrimination is entitled to Section 703(h) protection at all, but also whether in that case the protection extended to two particular seniority ground rules alleged to have a disparate impact upon Blacks and Hispanics. These were (1) the rule defining seniority units along departmental lines, and (2) the separate rule providing that an employee transferring from one departmental unit to another must forfeit his accumulated competitive seniority. Properly, there was no question but that these rules were a part of the seniority system involved. *See Teamsters*, *supra*, 431 U.S. at 343-356.

Other decisions of the Court have also recognized that what are here termed "ground rules" are very

much an integral part of seniority systems. In *Aeronautical Industrial District Lodge 727* v. *Campbell*, *supra*, for example, the Court noted as part of the "seniority principle" the range of such rules, including "the time when seniority begins," the "determination of the units subject to . . . seniority," the "consequences which flow from seniority," whether "probationary conditions must be . . . met before seniority begins," whether "it becomes retroactive to the date of employment" or "only as from the qualifying date," and whether seniority "is determined on a company basis," an occupational basis, or a plant basis, 337 U.S. at 526-27. *See also Tilton* v. *Missouri Pacific R.R. Co.*, 376 U.S. 169, 181 (1964) (recognition of training requirement as a legitimate aspect of seniority).[9]

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[9] The Sixth Circuit in *Alexander* v. *Machinists, Aero Lodge 735*, 565 F.2d 1364 (6th Cir.), *cert. denied*, 436 U.S. 946 (1978), has also recognized that seniority ground rules are properly included with the concept of seniority systems. There, the collective bargaining agreement provided that employees having prior experience in a particular job, called "job equity," would have preference over those lacking job equity, both in regard to promotions and bumping rights. 565 F.2d 1376-77. In rejecting a claim that this provision was not entitled to Section 703(h) protection, the court properly observed:

> With regard to the job equity features of the collective bargaining agreements, it could be argued that they are not a facet of the seniority system but a separate element affecting job competition and hence not immune under § 703(h) of the Act. The Act, however, speaks not simply of seniority but of a bona fide seniority . . . system. A preference to those with experience in a given occupation is in a sense limited occupational seniority and we see nothing in the statute or in Teamsters

In summary, a review of the "conventional uses of the seniority system in the process of collective bargaining" reveals that such systems are not limited to any one "fundamental component," but rather include as well a vast array of integrally related rules that determine how in fact seniority systems operate. Therefore, if Section 703(h) is to provide protection to the vested seniority rights of employees, as Congress clearly intended, *Teamsters*, *supra*, 431 U.S. at 352-53, then the term "seniority system" as used in that provision must be understood to include such rules. Accordingly, the Ninth Circuit's conclusion that the 45-week provision is not part of a "seniority system" for purposes of Section 703(h) must be rejected, since this provision is clearly a rule related to and governing the acquisition of seniority.[10]

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to indicate that it should stand on a different footing than traditional plant-wide or departmental seniority. It is a contractual provision neutral on its face and is, in our view, an integral part of Avco's unique but nonetheless bona fide seniority system.

565 F.2d 1378-79.

[10] According to data reported in the *1972 BLS Seniority Bulletin*, *supra* note 5 at 33, rules governing the acquisition of seniority appeared in approximately 76% of the agreements studied having seniority provisions. Of these, approximately 20% provided that if probationary service were interrupted (for example, by layoff), the credit accumulated would be retained, but the probationary period, as with the 45-week requirement, had to be completed within a specified amount of time. Such provisions were found in agreements affecting almost 50% of the workers covered by seniority provisions.

B. The Ninth Circuit's Test for "True" Seniority Systems Impermissibly Dictates the Substantive Terms of Collective Bargaining Agreements

As recognized in numerous decisions of this Court involving both the National Labor Relations Act and Title VII, it is a fundamental tenet of our national labor policy to provide broad freedom to employers and unions to work out collective bargaining provisions that best suit their individual needs. Concomitantly, that policy counsels strongly against dictating to employers and unions what the terms of their agreements must be. *See, e.g., Trans World Airlines, Inc.* v. *Hardison*, *supra*, 432 U.S. at 79-83; *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970); *NLRB* v. *Insurance Agents' International Union*, 361 U.S. 477 (1960); and *NLRB* v. *American National Insurance Co.*, 343 U.S. 395 (1952). *See also* Wellington, *Freedom of Contract and the Collective Bargaining Agreement*, 112 U. PA. L. REV. 467 (1964).[11]

The same policy applies to the interpretation of "seniority system" under Section 703(h). As with the analogous provision under the Selective Training and Service Act of 1940, "the Act uses the term 'seniority' without definition. It is thus apparent that Congress was not creating a [particular] system of seniority but recognizing its operation as part of the process of collective bargaining." *Campbell*, *supra*,

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[11] *Cf. United Steelworkers of America* v. *Weber*, 47 U.S.L.W. 4851, 4854 (U.S. June 27, 1979), where the Court observed that Title VII is to be interpreted generally such that "'management prerogatives and union freedoms . . . [are] left undisturbed to the greatest extent possible,'" *quoting* H.R. Rep. No. 914, 88th Cong., 1st Sess., Pt. 2, at 29 (1963).

337 U.S. at 526. This "process of collective bargaining" has produced "great variations in the use of the seniority principle," as the Court has noted, *Campbell*, *supra*, 337 U.S. at 526, and "[t]he legislative history [of Section 703(h)] contains no suggestion that any one system was preferred," *Teamsters*, *supra*, 431 U.S. at 355 n.41.

The approach of the Ninth Circuit to the determination of what constitutes a "true" seniority system under Section 703(h) is in fundamental conflict with this policy. According to its view, seniority systems, to be accepted as such, must operate in a very particular way. They must involve: (1) increases in employment rights and benefits that occur (2) "incrementally" as opposed to in an "all-or-nothing" fashion and (3) be "automatically" based on service alone rather than in combination with any other factor that is "susceptible to discriminatory application." *Bryant*, *supra*, 585 F.2d at 427. Further, a provision is not part of a "true" seniority system if it results in later-hired employees acquiring greater rights than other employees "regardless of whether one measures seniority by length of employment in a bargaining unit, plant, company, or industry." *Id.* This attempted definition of the "true" seniority system could not be more at odds with the national labor policy to afford maximum "freedom of contract" to the collective bargaining process. *See H.K. Porter Co.* v. *NLRB*, *supra*, 397 U.S. at 108.[12]

[12] *Cf. Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 578 (1978), where the Court admonished the court of appeals below in that case not to require "businesses to adopt what it perceives to be the 'best' hiring policy" in terms of minimal adverse impact on minorities. Analogously, employers and unions should not be required to adopt "true" seniority systems that will minimize disparate impact. "Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." 438 U.S. at 578. *A fortiori*, this admonition applies to collective bargaining.

If adopted, the lower court's test for the "true" seniority system would place outside Section 703(h) scores of provisions nationwide.[13] One example is a typical probationary system. Suppose that a union and employer have agreed that what best suits their particular circumstances is an arrangement with the following features: (1) a new employee must work sixty days before acquiring seniority;[14] (2) there is no contractual limitation on discharge during this period;[15] (3) in the event of a layoff or other interruption during the probationary period the time previously worked is preserved but no credit is granted during the interruption;[16] and (4) the contract

[13] *See* note 10, *supra*.

[14] In the *1972 BLS Seniority Bulletin*, *supra* note 5 at 33, the data there reported indicate that of the collective bargaining agreements studied which referred to seniority at all, almost 75% involved some type of probationary period. In the sample studied alone, these agreements with probationary provisions covered over one million workers. *Id.*, Table 2.

[15] Probationary employees typically do not enjoy the standard "just cause" limitation on discharge that applies to permanent employees. *See Slichter*, *supra* text accompanying note 6 at 124; *1972 BLS Seniority Bulletin*, *supra* note 5 at 5.

[16] This type of provision appeared in 88% of the BLS-studied agreements that referred to an interruption of service during the acquisition of seniority. Within the sample alone, such provisions covered over 750,000 workers. *1972 BLS Seniority Bulletin*, *supra* note 5 at 33, Table 4.

specifies a time limit within which the probationary period must be completed.[17]

Under the Ninth Circuit's test for "true" seniority systems, this probationary arrangement would fail. First, it "does not provide for incremental increases in employment rights or benefits based on length of overall service." *Bryant*, *supra*, 585 F.2d 427. Rather, it contains a disapproved "all-or-nothing" feature. Until the employee has worked the requisite sixty days within the specified time period, he remains a temporary, regardless of accumulated service. Secondly, the progression from temporary to permanent is not "automatic." Rather, the employee's "chances of satisfying the provision automatically terminate at the end" of the specified period, if not completed. Thirdly, the arrangement is "susceptible to discriminatory application" since the employer may terminate the employee without cause prior to completing the sixty-day period. Finally, if one employee works straight through and becomes permanent in only sixty days, whereas another employee previously hired has worked a greater number of days but has not become permanent due to intervening layoffs, then the first employee will have greater rights than the second even though the first employee was hired later and has less accumulated service. Such a result does not comport with the Ninth Circuit's "true" seniority system. *Bryant*, *supra*, 585 F.2d at 426-27.

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[17] Such time limits on gaining seniority appeared in over 72% of the BLS-studied agreements referring to an interruption of service during the acquisition of seniority. These time limits covered some 715,000 workers. *Id.*

Standard seniority-based promotion provisions[18] would fare no better if the promotion decision depends upon any factor other than date of hire, since that would make the system nonautomatic and "particularly susceptible to discriminatory application," both forbidden features.[19] *Bryant*, *supra*, 585 F.2d at 427.

Finally, the seniority system involved in *Teamsters* itself would not pass the Ninth Circuit's test. That system involved departmental seniority units, and employees transferring from one department to another had to forfeit their accumulated seniority and start at the bottom of the new department's list. As a result of these rules, an employee transferring to a new department might have both an earlier date of hire and greater accumulated service than others there, yet be lower on the seniority roster. *Teamsters*, *supra*, 431 U.S. at 343-45. Such would not comport with the operation of "true" seniority systems where "employment rights should increase as the length of an employee's service increases." *Bryant*, *supra*, 585 F.2d at 426.

While the court below attempted to distinguish *Teamsters* in this regard, the effort was not convinc-

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[18] "Rarely does one find a contract clause in which seniority is the exclusive criterion for deciding on promotions." *Slichter*, *supra* at 198.

[19] This is not to suggest that reliance on the non-seniority factor should be totally immune from Title VII scrutiny simply because that factor is used in conjunction with seniority. The *bona fide* test outlined in *Teamsters* v. *United States*, *supra*, 431 U.S. at 355-366, serves to protect against abuse. *See* Section III(C), *infra*.

ing. Referring to *Teamsters*, the court of appeals said that the "fundamental" test of increasing employment rights with increasing service was there satisfied, because "employees with fewer weeks of service in a particular area (company or bargaining unit) could never acquire greater benefits within that area than employees with longer service there." *Bryant*, *supra*, 585 F.2d at 427. This observation does not effectively distinguish the *Teamsters* system from the one in the brewing industry, however, since it is true in the latter as well that "employees with fewer weeks of service in a particular [classification, e.g., temporary or permanent] could never acquire greater benefits within that [classification] than employees with longer service there." *Bryant*, *supra*, 585 F.2d at 427. Thus, once the Ninth Circuit's manner of classification is accepted, the matter is resolved, yet the court offers no reason why the classification between departments is permissible but that between temporary and permanent is not. The comment in *Teamsters* that "[t]he legislative history [of Section 703(h)] contains no suggestion that any one system was preferred," *Teamsters*, *supra*, 431 U.S. at 355 n.41, would appear to indicate otherwise.

In summary, the court below has adopted a narrow and not altogether consistent view of what constitutes a "true" seniority system. But whether consistent or not, the Ninth Circuit's concept of the "true" seniority system is antithetical to the freedom accorded the collective bargaining process by our national labor policy. It places in jeopardy the seniority expectations of the countless employees that work under all of the non-"true" systems. In the enactment of the protections of Section 703(h), there is no

evidence whatsoever that Congress intended any such result.

C. A Proposed Test for Determining What Constitutes a Seniority System Within the Meaning of Section 703(h)

The Ninth Circuit's test for determining the existence of a "seniority system" under Section 703(h) is both too narrow (focusing on core seniority to the exclusion of the associated rules) and too specific (permitting only a particular type or "true" seniority system). A careful examination of the policies at work in Section 703(h) suggests both an appropriate definition of "seniority system" and an acceptable principle of limitation.

As noted in preceding sections, Congress has not defined "seniority system" in the statute, and it has thus been necessary to "look to the conventional uses of the seniority system in the process of collective bargaining." *Campbell*, *supra*, 337 U.S. at 526. That "look" in turn has revealed two important criteria that any definition of seniority system must meet. First, the definition must be sufficiently broad to include not only core concepts of seniority, i.e., employment rights increasing with service, but also the customarily associated rules that determine, among other things, how seniority is defined, measured, acquired, transferred, lost, regained, and applied. Second, any definition of seniority should be consistent with the fundamental tenet of national labor policy to provide unions and employers broad freedom to work out their own collective bargaining agreements, and to avoid dictating the substantive terms of those agreements.

Thus, a proper definition of seniority should not restrict employers and unions to any particular arrangement, "true" or otherwise. Together, these principles indicate that "seniority systems," for purposes of Section 703(h), should be construed broadly and consistently with the great variety of arrangements in existence when Congress enacted the statute. Accordingly, the following test for Section 703(h) "seniority systems" is suggested:

> The provisions of a collective bargaining agreement or employment policy [20] shall be deemed a seniority system so long as, in some fashion, employment rights or benefits increase with some measure of time worked or employed. Further, a particular provision shall be regarded as a part of a seniority system so long as there is a nexus between the provision and the operation of that seniority system. Specifically included, among others, are the "ground rules" of seniority systems which determine how seniority is defined, measured, acquired, transferred, lost, regained, and applied. Length of service need not be the sole determinant of the employee rights or benefits in question.

While this test would appear to encompass the national labor policy considerations just noted, it is not here suggested that this be the end of the analysis. Another policy that must be taken into consideration as well is the policy to construe the remedial provisions of Title VII broadly. Clearly, this requires some limitation upon the immunity granted by Section 703(h) even to seniority systems and provisions that meet the above test.

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[20] The language of Section 703(h) is not limited to collectively bargained seniority arrangements.

In *Teamsters*, this Court has indicated the proper approach. Thus, it should not be sufficient, in order to acquire the immunity of Section 703(h), that the employment practice in question simply be the result of the operation of a seniority system. One must look further and determine the *bona fides* of that system, including: (1) whether it applies equally to all groups without regard to race, color, religion, sex, or national origin, (2) whether it adversely affects only one group, (3) whether it is rational, and (4) whether it has been negotiated and maintained free of discrimination. *Teamsters*, *supra*, 431 U.S. at 355-56.

The court below confused its concerns over the *bona fides* of the 45-week rule with the question of whether the requirement was nonetheless part of a seniority system. As a seniority acquisition rule of a type not uncommon in industry, the 45-week provision clearly should be regarded as part of the seniority system. There of course remains to be determined whether the 45-week provision, together with the remainder of the seniority system to which it relates, otherwise meets the *bona fides* requirements of *Teamsters*.

The Ninth Circuit need not have feared that by placing the 45-week rule within the definition of "seniority system," the result would be similarly to immunize a whole variety of employment practices hitherto subject to Title VII challenge. *See Bryant*, *supra*, 585 F.2d at 427 n.11. First, it would be a rare seniority system indeed which contained the provisions envisioned by the Ninth Circuit. Certainly educational requirements generally would not be entitled to section 703(h) protection since they would

normally lack the essential nexus to the operation of a seniority system. Further, virtually no seniority systems actually in existence contain educational requirements. *See generally Schlicter, supra; 1972 B.L.S. Seniority Bulletin, supra.* The hypothetical of the court of appeals thus bears little relationship to industrial reality. Second, were such provisions to be included in a seniority system with any intention of favoring a particular race or sex, they would not meet the "*bona fides*" test of *Teamsters* and would thus not be entitled to Section 703(h) protection. In the rare case where such a provision had the required nexus to seniority and met the *Teamsters bona fide* test, but resulted in disparate impact independent of any past practices of the employer, then the policies underlying Section 703(h) suggest a limiting principle.

Congress enacted Section 703(h) in response to the concern that Title VII would "destroy existing seniority rights," if the tendency of even *bona fide* seniority systems to perpetuate prior discrimination were deemed unlawful. *Teamsters, supra,* 431 U.S. at 350, 352. However, there is nothing in the legislative history to suggest that Congress likewise intended to insulate employment practices which had an adverse impact independent of any past practices of the employer which would not be permitted elsewhere, simply because such practices might be written into a seniority system. This suggests that in the rare circumstance noted above the *Teamsters bona fides* analysis be supplemented by an examination of the source of the disparate impact allegedly caused by the operation of the seniority system. If, and to the extent that, the disparate impact results solely from the

perpetuation of some past condition, then, consistent with the congressional purpose, the seniority expectations of employees who have worked under that system should be protected. Conversely, if, and to the extent that, the alleged disparate impact is independent of any past practice on the part of the employer, then the discriminatory provision should not be immune from Title VII attack, simply because it happens to be a part of the seniority system.

A comparison between the *Teamsters* interdepartmental transfer rule and the hypothetical educational requirement posed by the court below illustrates both the application of the proposed test and why the Ninth Circuit's concerns were unfounded. In *Teamsters,* the transfer rule discouraged movement from the less desirable city-driver jobs to the more desirable long-haul jobs because it required that a transferee forfeit his accumulated seniority and start at the bottom of the roster in the new department. Because of prior discrimination, this transfer rule had the effect of locking blacks and Hispanics into the less desirable city-driver unit.[21] While the rule thus per-

[21] While the pattern perpetuated in *Teamsters*—that of a disproportionately white long-haul unit and a disproportionately black and Hispanic city-driver unit—was the result of prior discrimination by the employer, there would not appear to be any basis under Section 703(h) for requiring that the pattern perpetuated by a seniority system be discriminatorily caused. Otherwise, the result would be an anomalous rule whereby seniority expectations resting upon past discrimination would be protected, whereas those resting upon patterns lawfully originated would not be. *Cf. United Airlines* v. *Evans, supra,* 431 U.S. at 558-560. Accordingly, a seniority system which perpetuates any past practice, lawful or unlawful, should be entitled to Section 703(h) protection.

petuated past discrimination, it was not discriminatory in and of itself. That is, as the Court observed, it equally discouraged whites as well as blacks and Hispanics within the city-driver unit from transferring. *Teamsters*, *supra*, 431 U.S. at 344-55. Accordingly, under the proposed test, the seniority system would be entitled to Section 703(h) protection, since the disparate impact results solely from the perpetuation of some past condition.

By comparison, consider the same *Teamsters* seniority system, but assume that instead of the particular transfer rule involved there, the agreement had provided that only employees with high school diplomas could become long-haul drivers.[22] Further, assume that there was a substantially lower incidence of high school diplomas among black and Hispanic city drivers than among white city drivers. Given these conditions, the diploma rule would not apply equally to all city drivers attempting to transfer, but instead would disproportionately screen out blacks and Hispanics. As such, the diploma rule would not be entitled to Section 703(h) protection under the test proposed here, since the disparate impact involved would be caused not by a mere perpetuation of some past practice on the part of the employer, but through a present adverse impact caused by the provision itself.[23]

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[22] This assumes arguendo, of course, that the lower court's hypothetical educational requirement for entry into a seniority line, *Bryant*, *supra*, 585 F.2d 427 n.11, would satisfy the test proposed above for what constitutes part of a seniority system to begin with.

[23] That such an educational requirement would not qualify for Section 703(h) protection would not necessarily mean that it would be unlawful, since the job-relatedness and business-necessity defenses under *Griggs* would still be available.

In contrast to the diploma requirement, the 45-week provision would meet both prongs of the suggested test. First, as a seniority acquisition rule of a type not uncommon in industry, it has the required nexus to seniority and thus comes within the meaning of "seniority systems" for purposes of Section 703(h). Second, the alleged discriminatory effect of the 45-week provision results solely from the perpetuation of alleged prior discrimination. In and of itself, apart from its connection with the seniority system, it has no discriminatory effect. As the court below found, it prevents blacks and whites equally from advancing to the permanent classification. *Bryant*, *supra*, 585 F.2d at 424. Accordingly, if the 45-week provision and the seniority system of which it is a part otherwise meet the *bona fides* requirements of *Teamsters*, then no violation would have been shown. Thus, a remand would appear appropriate for that determination.[24]

IV. CONCLUSION

Amicus respectfully urges the Court to reject the approach adopted by the Ninth Circuit below to the determination of what constitutes a "seniority sys-

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[24] If the standard proposed here is adopted, the lower courts should be cautioned not to use the suggested analysis of disparate impact as a back door out of Section 703(h) and into *Griggs*. Only in rare cases will a seniority system involve disparate impact that is caused other than by a perpetuation of some past practice.

tem" under Section 703(h) of Title VII. As shown, the lower court's approach conflicts fundamentally both with our national labor policy to afford broad freedom to the collective bargaining process and with the policy of Title VII to protect the seniority expectations of incumbent employees. It does so by impermissibly excluding seniority administration rules from the definition of seniority systems, by dictating that seniority systems must operate in a very particular way, and by failing to distinguish between disparate impact caused merely by perpetuation of past discrimination and that caused otherwise.

As an alternative, *Amicus* has suggested to the Court an approach respecting the policies underlying the collective bargaining process as well as the broad remedial goals of Title VII. We respectfully urge the Court to adopt that approach.

Respectfully submitted,

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